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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-762

EDWARD HINES LUMBER CO.,
A DELAWARE CORPORATION,
Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
A NEVADA CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Edward Hines Lumber Co. (hereinafter "Hines") respectfully submits this Reply Memorandum in support of its Petition for Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 25, 1971. This Reply directs itself to matters raised in the Brief in Opposition of Respondent, Centex-Winston Corporation (hereinafter "Centex").

ARGUMENT.

The Principal Reasons Urged by Petitioner in Support of Its Request for a Writ of Certiorari Are Uncontested.

The Brief in Opposition filed by Centex in large part tacitly admits the major contentions of the Petition for a Writ of Certiorari and is substantially unresponsive to the Petition. Centex does not dispute the crucial fact that this case presents an important question of first impression involving a key provision of the Robinson-Patman Act, i.e., whether Section 2(e) of that Act applies to differences in the timeliness of delivery service.

Centex also leaves substantially unchallenged Hines' contention that the decision below extending Section 2(e) to encompass such delivery services is inconsistent in principle with the Act as a whole, the legislative history of Sections 2(d) and 2(e) and the controlling decisions, administrative rulings and guidelines, and texts addressing themselves to this problem since the passage of the Act.

Centex states "the words of the statutes are to be taken in their usual and customary meaning" (Res. Br., p. 4). As set forth in detail in the Petition, for 35 years the usual and customary meaning of Section 2(e) has been that this Section, which imposes *per se* liability, does not extend to differences in the time of delivery nor, indeed, to services or facilities other than advertising and promotional allowances furnished in connection with the buyer's resale of goods purchased from the seller.

Centex's statement of the legislative history at page 5 of its brief is simply inaccurate. It is clear from the legislative history, and, in particular, from the remarks of Congressman Utterback that Sections 2(d) and (e) were concerned only with "the grant of discrimination under the guise of payment for advertising and promotional services

. . . [and] others by which the same purpose might be accomplished" (Pet., pp. 7-8). There is nothing inconsistent with the foregoing in the remarks of Congressman Utterback quoted by Centex (Res. Br., p. 6) or in Section 2(b) of the Act (Res. Br., p. 7). No text or other authorities read the legislative history as does Centex.

Centex's argument that because Section 2(d) deals with price-related discriminations, Section 2(e) must be construed to relate only to other types of discrimination (Res. Br., p. 6) is clearly contrary to the legislative history and the numerous judicial and other interpretations holding that these sections are substantially identical in scope,[1] and the many holdings that price related discriminations are illegal under 2(e).

Centex argues that Hines' authorities lack weight because only cases dealing with advertising and promotional services are cited to demonstrate the conflict of judicial decisions. This is precisely the point. Section 2(d) and 2(e) cases involve discriminations in the furnishing of promotional or advertising services in connection with resale because these sections only prohibit such discriminations. The "special packaging"[2] and "product return"[3] cases referred to by Centex are no exception. They involve advertising and promotional arrangements in connection with resale required to establish a 2(e) violation.

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1. Rowe, p. 390. See *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132, 134 (2d Cir. 1946), *cert. denied*, 331 U. S. 806 (1947); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 992-993 (8th Cir. 1945); *cert. denied*, 326 U. S. 773 (1945); Report of the Attorney General's National Committee to Study the Antitrust Laws, 189 (March 31, 1955).

2. *In the Matter of General Foods Corp.*, 52 FTC 798 (1956); *In the Matter of Luxor, Ltd.*, 31 FTC 658 (1940).

3. *In the Matter of Appleton-Century-Crofts, Inc.*, 47 FTC 1371, 1375-76 (1951); *In the Matter of American Greetings Corp.*, 49 FTC 446, 450 (1953); *In the Matter of Joseph A. Kaplan & Sons, Inc.*, 63 FTC 308, 1331-32 (1960), *aff'd. and modified*, 347 F. 2d 785 (D. C. Cir. 1965).

In both *Luxor* and *General Foods*, the special packaging was viewed as a sales promotional device which *directly* facilitated the resale by favored customers. *General Foods* expressly limited the applicability of 2(e) to promotional services connected with resale, stating at page 822:

> "Legislative history indicates that the purpose of Section 2(d) [and hence 2(e)] was to reach the evil of granting discriminations in the form of special allowances in purported payment of *advertising and other sales promotional services.*" [Emphasis added.]

In *Joseph A. Kaplan & Sons*, the Commission similarly rested its decision on the fact that the return privilege was a sales promotion device which furthered the resale of all the buyer's products. The other "product return" cases cited by Centex were not contested or litigated, and their importance is discounted by Rowe at page 378 of his book.

A review of the entire decision in *Simplicity Pattern*[4] shows that the Court had nothing more in mind than indirect price discriminations when it contrasted Sections 2(c), (d) and (e) with Section 2(a). The discrimination in that case was the granting of catalogs and display cabinets in connection with resale and the Court found that these advertising and promotional services were indirect price discriminations in violation of Section 2(d).

In sum, the only interpretation of Section 2(e) to which Centex can legitimately point as inconsistent with the "usual and customary meaning" of that statute is the decision of the Court below.

Referring to Thanksgiving turkeys and best-selling books, Centex speciously argues that sellers should be required to give relatively simultaneous delivery to all competing customers. This is, of course, completely unrealistic and explains why time of delivery has been traditionally a

4. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 65.

question governed by contract between the parties and has never been a matter of federal regulation as a price discrimination under Section 2(e) of the Robinson-Patman Act.

For the foregoing reasons and the reasons set forth in the Petition heretofore filed, it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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